In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 622

EMILIO PIZZARELLO, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner filed a complaint in the United States District Court for the Southern District of New York asking that respondents, the United States and officials of the Internal Revenue Service, be restrained from collecting wagering taxes which had been assessed against him. Petitioner challenged the constitutionality of those sections of the Internal Revenue Code under which respondents purported to be acting and asked that a three-judge court be con-

vened pursuant to 28 U.S.C. 2282 (Pet. 13-14, 18a, 20a, 24a-25a). The district court, being of the view that it was without jurisdiction to enjoin the assessment or collection of a tax under Section 7421(a) of the Code,[1] refused to convene a three-judge court (Pet. 18a) and dismissed the complaint (Pet. 20a-29a; 285 F. Supp. 147).

On appeal, the Second Circuit held (Pet. 7a), in accordance with this Court's decision in *Enochs* v. *Williams Packing & Nav. Co., Inc.*, 370 U.S. 1, that notwithstanding the seemingly absolute language of Section 7421(a), "'it was proper to enjoin an attempted tax collection where 'it is clear that under no circumstances could the Government ultimately prevail' *and* where 'equity jurisdiction otherwise exists.'"

The court of appeals found that petitioner had satisfied the first of the two tests prescribed in *Enochs* v. *Williams Packing & Nav. Co.* because the assessment was excessive and based on entirely inadequate information[2] (Pet. 7a-11a, 14a), and be-

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[1] In pertinent part Section 7421(a) provides:

"* * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

[2] The court of appeals held that the Commissioner could not properly assess gambling taxes for a five year period on records covering only three days of petitioner's operation (Pet. 9a-11a). This appears to conflict with a recent decision of the Seventh Circuit. *Mitchell* v. *Commissioner*, No. 17363, decided August 20, 1969. See also *Shades Ridge Holding Co.*,

cause it was based, at least in substantial part, on illegally seized evidence[3] (Pet. 11a-14a). The court determined, however, that petitioner had failed the second test prescribed since "no hearing had been held below on what economic damage Pizzarello may suffer if collection is not enjoined" (Pet. 17a). It accordingly remanded the case to the district court for a hearing on the question whether petitioner's remedy at law would be adequate,[4] or whether he would suffer irreparable injury if equitable relief were denied (Pet. 14a-17a). The district court's refusal to convene a three-judge court was affirmed (Pet. 17a), and the present petition for a writ of certiorari is addressed solely to this refusal of a three-judge court.

The opinion of the Second Circuit was handed down on March 18, 1969 (Pet. 2). On April 24, 1969, petitioner's request for a rehearing was denied

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Inc. v. *Commissioner*, 23 T.C.M. 27,014, affirmed *sub nom. Fiorella* v. *Commissioner*, 361 F. 2d 326 (C.A. 5); *Mersel* v. *United States*, No. 25,428, decided October 2, 1969 (C.A. 5); *Mladinich* v. *United States*, No. 27380, decided October 2, 1969 (C.A. 5). It should also be noted that the instant case came before the Second Circuit on a preliminary injunction record. The government had never answered the complaint and there had never been a hearing on the merits.

[3] The court of appeals noted that this Court has never decided whether illegally seized evidence may be used in a civil case (Pet. 12a). *Cleary* v. *Bolger*, 371 U.S. 392, 403, 413 (concurring and dissenting opinions); *Compton* v. *United States*, 334 F. 2d 212, 217 (C.A. 4).

[4] Since the tax in question is an excise tax petitioner can institute a refund action in the district court for the recovery of any tax collected.

(Pet. 2). No request having been made for a stay, the mandate was forwarded to the district court on May 6, 1969. The hearing directed by the Second Circuit was held on May 22, 1969, and on June 24, 1969, the district court filed a memorandum opinion in which it found that petitioner would suffer no irreparable injury upon denial of the injunctive relief sought by his complaint (Pet. 15). We have been informed by the United States Attorney that petitioner moved on July 2, 1969, for a reopening of the hearing in the district court; that this motion has been denied; and that no final order has been entered to date.[5] Accordingly, the court of appeals has not yet had any opportunity to review the findings of fact on remand.

Since petitioner is still pursuing his remedies in the lower courts, the case is not ripe for review in this Court. If petitioner has an adequate remedy at law, as the district court has held, Section 7421(a), as construed in *Enochs* v. *Williams Packing & Nav. Co., Inc.*, would bar injunctive relief, and there would be no basis for convening a three-judge court. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715; *Howfield, Inc.* v. *United States*, 409 F. 2d 694 (C.A. 9).

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[5] Approximately $126,000 in currency, seized under a jeopardy assessment on April 15, 1965, has been ordered to remain in the custody of the United States Marshal pending the outcome of this case (Pet. 3a-4a, 17a). The United States Attorney advises that the government has agreed, in writing, not to levy upon petitioner's business or real estate pending the outcome of the case.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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